

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JUNE 29 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

SERGIO FIERRO,

Appellant.

)
)
) 2 CA-CR 2006-0265
) DEPARTMENT B
)

MEMORANDUM DECISION

) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053108

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Cari McConeghy-Harris

Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes

Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Sergio Fierro was convicted of theft of a means of transportation, criminal damage, fleeing from a law enforcement officer, and possession of

burglary tools. After a trial on the state’s sentence-enhancement allegation, the trial court found by clear and convincing evidence that Fierro had one historical prior felony conviction. The trial court sentenced him to concurrent, presumptive prison terms, the longest of which was 6.5 years. On appeal, Fierro contends the trial court “violated his state and federal constitutional rights to have a jury find his prior convictions beyond a reasonable doubt.” We affirm.

¶2 We note at the outset that Fierro did not object below to the trial court’s conducting a trial on the state’s enhancement allegation, nor did he contend he was entitled to have a jury determine the fact of his prior conviction. Consequently, he waived all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). We see no error here, much less error that can be characterized as fundamental.

¶3 Fierro concedes that in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), the Supreme Court excepted the fact of a prior felony conviction from the rule it announced in that case, that a defendant is entitled to have a jury determine beyond a reasonable doubt “any fact that increases the penalty for a crime beyond the prescribed statutory maximum.” Fierro contends, however, that *Apprendi* rendered questionable the continued vitality of *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 1228-29 (1998), in which the Court held that a defendant is not entitled to a jury trial on an allegation of prior convictions for sentence-enhancement

purposes. He also asserts that this court wrongly decided *State v. Cons*, 208 Ariz. 409, 94 P.3d 609 (App. 2004). There, we noted *Apprendi*'s exception of prior convictions from its purview, holding that "because neither [A.R.S. § 13-604] nor *Apprendi* requires a jury trial on the allegation of prior convictions, the heightened burden of proof[, beyond a reasonable doubt,] does not apply but rather prior convictions for sentence enhancement purposes must be established by clear and convincing evidence." 208 Ariz. 409, ¶ 15, 94 P.3d at 615.

¶4 We think the law is well settled that the fact of prior convictions remains excepted from the right articulated in *Apprendi* and that *Cons* was correctly decided in this regard. In *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004), the Supreme Court reiterated this principle as it relates to the use of a prior conviction as an aggravating circumstance under A.R.S. § 13-702 rather than to enhance a sentence. And, in *State v. Keith*, 211 Ariz. 436, ¶¶ 2-3, 122 P.3d 229, 229-30 (App. 2005), this court rejected essentially the same argument that Fierro is raising.

¶5 Fierro's convictions and sentences are affirmed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Judge

PHILIP G. ESPINOSA, Judge